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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1964

WARREN TRADING POST COMPANY,

Appellant

vs.

THE ARIZONA STATE TAX COMMISSION, ET AL,

Appellee

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF OF THE PAPAGO TRIBE AS AMICUS CURIAE

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INDEX

PAGE

INTRODUCTION – INTEREST OF THE *AMICUS CURIAE* 1

ARGUMENT:

I. "The jurisdiction of the United States over commerce with the Indian tribes is supreme and exclusive." 2

II. "The Arizona tax statute, as applied, constitutes an unconstitutional burden upon Indian commerce, a field which has been completely occupied." 4

III. "If there is any residual power to regulate Indian commerce, it lies with the Indian tribes, and not the states" 6

IV. "Where Congress has consented to state action in an otherwise federal area, the states must comply with the terms of that consent." 9

CONCLUSION 11

APPENDIX – The Papago tax ..... A 1 - A 5

TABLE OF CASES AND AUTHORITIES

CASES

PAGE

Arenas v. United States, 140 F. Supp. 606 (S. D. Cal., 1956), aff'd sub. nom. *Kirkwood v. Arenas*, 243 F.2d 863 (C.A. 9th, 1957) 4

Arizona State Tax Commission v. Garrett Corporation, 79 Ariz. 389, 291 P.2d 208 (1955) 3, 8

Blair, Superintendent v. McAlhaney, 123 F.2d 142 (C.A. 4th, 1941) 5

Brown v. Maryland, 12 Wheat. 419 (1827) 3

Buster and Jones v. Wright, 135 F. 947 (C.A. 8th, 1905) 7

Chanler v. Kelsey, 205 U.S. 466 (1907) 4

Cherokee Nation v. Georgia, 5 Pet. 1 (1831) 6

Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917) 3

Crowdog, Ex Parte, 109 U.S. 556 (1883) 7

Dick v. United States, 208 U.S. 340 (1908) 2, 3

Gibbons v. Ogden, 9 Wheat. 1 (1824) 3

Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957) 4

Hanley v. Kansas City Southern Ry Co. 187 U.S. 617 (1903) 3

Leslie Miller v. Arkansas, 352 U.S. 187 (1956) 6

Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283 (1898) 3

Mayfield, In Re, 141 U.S. 107 (1891) 7

McCulloch v. Maryland, 4 Wheat. 316 (1819) 3

Morris v. Hitchcock, 194 U.S. 384 (1904) 7

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 3

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 3

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) 3

Pennsylvania v. Nelson, 350 U.S. 497 (1956) 4

Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) 11

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 5

Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) 3

State Tax Commission of Utah v. Aldrich, 316 U.S. 174 (1942) 10

United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876) 3

United States v. Parton, 132 F.2d 886 (C.A. 4th, 1943) 5

Warren Trading Post Company v. Moore, 95 Ariz. 110, 387 P.2d 809 (1963) 2, 5, 8, 9

Williams v. Lee, 358 U.S. 217 (1959) 3, 6, 9, 10

Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940) 10, 11

Worcester v. Georgia, 6 Pet. 515 (1832) 6

Constitutional Provisions and Statutes

United States Constitution, Art. I, § 8, cl. 3 2

19 Stat. 176 (1876), 25 U.S.C. § 261 ..... 4, 5

31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 25 U.S.C. §§ 262-264 ..... 5, 6

50 Stat. 536 (1937), 25 U.S.C. §§ 463 (a)-(c) 1

59 Stat. 33 (1945), 15 U.S.C. 1011-1015 11

Arizona Revised Statutes § 42-1308 (F) 3

Regulations and Ordinances

22 F.R. 10670-74 (1957), 25 C.F.R. §§251-252 (1958) 4

Resolution 43, Ordinance of the Papago Tribal Council, Approved July 22, 1963 8

Resolution 44, Ordinance of the Papago Tribal Council, Approved November 22, 1963 ..... 1, 8

Other Authorities

55 I.D. 14, 24-26 7

57 I.D. 124 5

58 I.D. 562 5

60 I.D. 176 5

Federal Indian Law, U. S. Dept. Interior (1958) 6, 7

Restatement, Conflict of Laws, §46 (1), "comment e," (1943) 4

U. S. Code Congr. & Admin. News, Vol. 2, 83rd Cong., 1 Sess., 1953, pp 2409-2414 10

Warren, *The Supreme Court in United States History*, Vol. 1, c. 19, pp 729-779 6

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WARREN TRADING POST COMPANY,

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vs.

THE ARIZONA STATE TAX COMMISSION, ET AL;

Appellee

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

INTRODUCTION — INTEREST OF THE AMICUS

The Papago Tribe resides in Southern Arizona on Reservations in the Sells, Gila Bend, and San Xavier areas established by Executive Order and Congressional Enactments. 50 Stat. 536 (1937), 25 U.S.C. Sec. 463 (a)-(c).

The Tribe and its members do business with several licensed traders on the Reservations, and the Tribe has recently obtained the approval of the Department of the Interior to impose a regulatory privilege tax upon those traders measured by three per cent (3%) of their gross reservation sales. Resolution 44, Ordinance of the Papago Council, approved November 22, 1963; set forth in Appendix, page A4, post.

The interest of this *amicus curiae* arises because the tax upheld by the decision below conflicts with the Tribe's own tax, and because the decision below may well constitute precedent for additional regulations imposed by the State of Arizona amounting to an assumption of powers heretofore not recognized over internal tribal affairs.

This brief is directed to the question of the affect of the decision on Indian sovereignty.

ARGUMENT

I.

The jurisdiction of the United States over commerce with the Indian tribes is supreme and exclusive.

The decision below (95 Ariz. 110, 387 P.2d 809) characterized the issues raised by Arizona's imposition of the tax as dealing with the question of whether the trader is entitled to an "exemption" from the ambit of the tax. It thus assumes the State's jurisdiction to impose the tax. As pointed out in the dissent (95 Ariz. 110, 120-124, 387 P.2d 809, 817-819), however, the question to be met is whether there is jurisdiction to impose the tax at all, because we are solely involved with on-reservation sales to reservation Indians by a federally licensed Indian trader.

Amicus' position is that the Arizona State Tax Commission has no jurisdiction to impose limitations or conditions on the right to do business on the reservation with reservation Indians. The federal power involved is the Commerce Clause (Article 1, Section. 8, Clause 3) of the United States Constitution, where Congress is given the power "to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." That power is as complete with relation to the Indian tribes as it is with relation to foreign nations, and is "exclusive and absolute." *Dick vs. United States,* 208 U.S.

340, 356 (1908). As set forth by counsel for the appellant in appellant's opening brief, the same reasoning which precludes state taxation of the privilege of engaging in interstate commerce [*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); *Spector Motor Service v. O'Connor*, 340 U.S. 602, 608 (1951)] or foreign commerce [*Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 295, 297 (1917); *Brown v. Maryland*, 12 Wheat. 419, 447-449 (1827)] should apply with at least equal force to the privilege of engaging in Indian commerce. *Gibbons v. Ogden*, 9 Wheat. 1, 193 (1824); *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617, 619 (1903); *U.S. v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Dick v. United States*, 208 U.S. 340, 356 (1908); *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Amicus submits that the tax in question is a regulation or licensing of the appellant's privilege of engaging in Indian commerce. Since the Arizona Supreme Court's interpretation of the Arizona transaction privilege tax governs its meaning here (*N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963)), there can be no doubt that the tax is imposed upon "the privilege or right to engage in business and is not a sales tax." *Arizona State Tax Comm. v. Garrett Corporation*, 79 Ariz. 389, 391, 291 P.2d 208, 209 (1955). Thus, the tax in question conditions the right to engage in business in Arizona; and one who fails to comply with those conditions is guilty of a misdemeanor. *ARS* § 42-1308 (F).

This Court has asserted that the inevitable effect of a privilege tax is to regulate. *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943), Cf. *McCulloch v. Maryland*, 4 Wheat. 316, 429-431 (1819). Accordingly, it has long been settled that "only the authority which confers it [the privilege] may impose conditions upon it." *Magoun v. Illinois Trust*

& *Savings Bank*, 170 U.S. 283, 288 (1898). Similarly,

> "The ground upon which this tax is imposed is . . . the right of the state to regulate or if it sees fit, to destroy, inheritances. If it might have not appropriated the whole, it cannot appropriate any part by the law before us." *Chanler v. Kelsey*, 205 U.S. 466, 482 (1907) (Holmes, J., dissenting).

See also *Arenas v. United States*, 140 F. Supp. 606, 608 (S.D. Cal., 1956) aff'd sub. nom. *Kirkwood v. Arenas*, 243 F.2d 863 (C.A. 9th, 1957); and *Restatement, Conflict of Laws*, § 46 (1), "comment e" (1943).

Thus, the authority to license Indian traders is exclusively that of the United States pursuant to the Commerce clause, and the Arizona State Tax Commission, therefore, lacks jurisdiction to enter that field.

II.

The Arizona tax statute, as applied, constitutes an unconstitutional burden upon Indian commerce, a field which has been completely occupied.

Even if the commerce clause did not create in the United States exclusive jurisdiction as to Indian commerce, the Arizona tax upon the privilege of conducting Indian commerce would still be invalid because Congress has occupied this field, leaving no room for state action. See *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 11 (1957) and *Pennsylvania v. Nelson*, 350 U.S. 497, 502-504 (1956). By statute[1] Congress has enacted a wide-ranging system of regulation of the qualifications and licensing of persons who trade with Indians, of the goods which may be sold by them, of the prices which they may charge, and of numerous other incidents to such trade. We have thus, a case where

[1] Act of August 15, 1876, 19 Stat. 176, 200, 25 U.S.C. 261; 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958).

> "The scheme of federal regulations may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

While the question has not yet been judicially determined, the history of the subject shows the scope of the authority vested in the Commissioner of Indian Affairs by 25 U.S.C. 261-264. This was the subject of a 1948 opinion by the Solicitor of the Interior Department, 60 I.D. 176. The Solicitor held there that because Congress had conferred upon the Commissioner the exclusive authority to appoint traders on the Indian reservations and to prescribe the terms and conditions governing their operations, the Navajo Tribe could not do so without the Commissioner's consent in advance. See *United States v. Parton*, 132 F.2d 886, 887 (C.A. 4th, 1943); *Blair, Superintendent v. McAlhaney*, 123 F.2d 142, 143 (C.A. 4th, 1941); 57 I.D. 124; 58 I.D. 562. Thus, the Solicitor's opinion states:

> ". . . a licensed trader is privileged to engage in trade with the Indians under whatever conditions and requirements the Commissioner may prescribe. Without the concurrence of the Commissioner, the Navajo Tribal Council has no authority to impose additional conditions or requirements. *Sperry Oil Co. v. Chisholm*, 264 U.S. 448 (1924); *Blanset v. Cardin*, 256 U.S. 319 (1920)." 60 I.D. 176, at p. 179.

It is submitted that the same considerations should apply whenever such "additional conditions or requirements" are sought to be imposed by a state, and that there is no justification for the Arizona Supreme Court's assertion (95 Ariz. at p. 118, 387 P.2d at p. 815) that in appointing Indian traders, the Commissioner should consider only those persons who will or have complied with

the Arizona transaction privilege tax law.[2] See *Leslie Miller v. Arkansas*, 352 U.S. 187, 188 (1956).

It is apparent, from the statute, from the interpretation given the statute historically and from the complete regulatory provisions enacted under the statute, that it was the intent that the Federal Government pre-empt this field, so that the absence of license tax provisions indicates the Congressional intention that none should exist. The Arizona tax statute thus conflicts with federal pre-emption and is therefore burdensome.

III.

If there is any residual power to regulate Indian commerce, it lies with the tribes, and not the states.

It has been the settled policy of the Federal Government, since the "Cherokee cases" of 1831 and 1832 (*Cherokee Nation v. Georgia*, 5 Pet. 1 (1831); *Worcester v. Georgia*, 6 Pet. 515 (1832)) and the attendant national crisis, that the autonomy of Indian tribes shall be maintained to the fullest extent, save as expressly limited by necessary federal legislation. This policy has been reaffirmed by this court as recently as 1959, in *Williams v. Lee*, 358 U.S. 217. The important history underlying this principle is outlined in Vol. 1, Warren, *The Supreme Court in United States History*, Chap. 19, pp. 729-779. As stated in *Federal Indian Law*, United States Dept. Interior (1958), p. 398:

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[2] 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 25 U.S.C. § 262 provides: "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

"The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign state. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, i.e., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government."

At page 396, op. cit., it is stated that:

". . . what is not expressly limited [by federal legislation] often remains within the domain of tribal sovereignty simply because State jurisdiction is federally excluded, and governmental authority must be found somewhere. That is a principle to be applied generally in order that there shall be no general failure of governmental control. *Phillips v. Payne,* 92 U.S. 130 (1876)."

"The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference."

To the same effect see *In Re Mayfield,* 141 U.S. 107, 115, 116 (1891); *Ex Parte Crowdog,* 109 U.S. 556, 568-572 (1883); 55 I.D. 14, 24-26. See also *Federal Indian Law,* op. cit., pp. 435-439.

As recognized in such cases as *Morris v. Hitchcock,* 194 U.S. 384 (1904), and *Buster and Jones v. Wright,* 135 F. 947, 950-952 (C.A. 8th, 1905), the Indian tribes possess inherent power to impose conditions on those who would trade with them upon their reservation, with the

approval of the Commissioner of Indian Affairs, and to enact similar police power-like regulations. It follows that the tribal sovereignty over these internal governmental functions remains undiminished in the absence of explicit and duly enacted federal regulations, and that it is the tribal sovereignty, and not that of the states, which takes up wherever the regulations of the United States may cease.

Whether these principles of Indian sovereignty were considered and rejected by the court below, or not taken into account at all, they stand seriously threatened by the decision below. At the present time, the Papago Tribe has imposed a three per cent (3%) transaction privilege tax (Ordinances 43-44, Appendix, post); if the decision below is affirmed the State of Arizona will also have a three per cent (3%) transaction privilege tax. The resultant six per cent (6%) will be measured by the gross proceeds from sales on the Papago Reservation which ultimately would be passed on to the Indian consumers. If the Commissioner of Indian Affairs allows a concomitant price increase by the trader, the burden obviously falls upon the Papagos. If the Commissioner of Indian Affairs refuses to allow such an increase, the burden then falls upon the traders.[3] The ultimate effect of permitting the state's imposition of taxation will undoubtedly result in the repealing of the Papagos' own tax in order to lessen the burden upon the individual Indian consumer. The tax would thus become a factor, "created by state fiat,"[4] which will necessarily have to be considered by both the Com-

[3] In which case, however, as pointed out by counsel for the Appellant, the tax would be discriminatory since the trader would then be the only licensee not allowed to pass the tax on to his customers. *Arizona State Tax Commission v. Garrett Corporation*, 79 Ariz. 389, 392-393, 291 P.2d 208, 210 (1955).

[4] 95 Ariz. 110, 130, 387 P.2d 809, 823 (Dissenting opinion by Justice Lockwood).

missioner of Indian Affairs and the Papago Tribal Council. Recognition of this state power would be in complete derogation of the principles of federal supremacy and Indian autonomy.

IV.

Where Congress has consented to state action in an otherwise federal area, the states must comply with the terms of that consent.

There can be little doubt that the license tax in question, if upheld here, will be borne by the Indians. The majority opinion below implicitly admits that the tax will and should be so borne by the Indians.[5] Arizona has thus, in effect, placed the "cart before the horse." At no time has the State seen fit to provide police services, education facilities, or any of the standard State functions, for the reservation Indians in Arizona. Nevertheless, the State now seeks the benefit of taxing those Indians upon their reservation.

Hence, the issue becomes similar to the jurisdictional issue in *Williams v. Lee*, 358 U.S. 217, 222 (1959), where the Court said:

> "In a general statute Congress did express its willingness to have any state assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility. Act of August 15, 1953 c. 505 §§ 6, 7, 67 Stat. 590 . . ."

The cited enactment paves the way for the removal of legal impediments to the cession of federal jurisdiction over the Indian tribes to those states which, by due process, are willing to accept the ceded jurisdiction and at-

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[5] ". . . There is no suggestion arising out of the stipulated facts that the Indians are less able to pay this tax than other residents of Arizona of a like or similar economic status." 95 Ariz. 110, 114, 387 P.2d 809, 812.

tendant responsibility. The purpose of this legislation is to secure the eventual assimilation of the Indian wards into complete citizenship and society with non-Indian Americans. See *U.S. Code Congr. & Admin. News,* Vol. 2, 83rd Congress, 1st Session, 1953, pp. 2409-2414. The comments on this point by the Court in *William v. Lee,* supra, are as appropriate here as they were then:

> "To date, Arizona has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable. See H.R. Rep. No. 848, 83rd Cong. 1st Sess. 3, 7 (1953); Secretary of Interior, Annual Report (1955), 247-248; id. (1956), 215-216; id. (1957), 253-254.
>
> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the Tribal Courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Williams v. Lee,* 358 U.S. 217, 222-223 (1959).

Arizona has still not commenced any steps toward undertaking jurisdiction of Indian matters. It is submitted that the State of Arizona should not be allowed to impose a tax to be borne by reservation Indians unless the State, in turn, is willing to accept a measure of responsibility with respect to those Indians.

The power to tax should be co-extensive, to some reasonable extent, with the obligation to provide governmental protections and benefits. *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444 (1940); *State Tax Commission of Utah v. Aldrich,* 316 U.S. 174, 180 (1942). Thus:

> "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by practical

operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

If the decision at bar is affirmed, however, the necessary implication is that the state need not comply with the terms of the Congressional consent to act in this area by accepting the responsibility of that jurisdiction in order to receive its benefits. Cf. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 412-427 (1946); and the "McCarran Act," Act of March 9, 1945, c. 20, 59 Stat. 33, 15 U.S.C. 1011-1015.

CONCLUSION

The power to regulate commerce with the Indian tribes is an area exclusively delegated to the United States and exclusively occupied by the existing scheme of federal regulation of such commerce. The State of Arizona therefore lacks the right and the power to enter that field by imposing its own conditions to the carrying on of such commerce. While Congress may consent to state action in a field in which it is otherwise supreme, no state can undertake such action without first complying with the terms of the consent.

The Papago Tribe's interest as *Amicus Curiae* is principally to show the effect of the decision below on Indian sovereignty. Historically, judicial decisions on the nature of Indian tribal powers evolved a policy of United States maintenance of the inherent sovereignty of the Indian tribes. Wherever that sovereignty is not limited by federal regulation, the authority to act remains with the tribes and not with the states. If this is not so, and if the states may rightfully burden Indian commerce

with conditions in addition to those properly imposed by the Congress and the Indians themselves, then that commerce has been greatly threatened. The Commissioner of Indian Affairs would lose his heretofore absolute control over Indian traders, since he would not be able to prevent state imposition of additional conditions upon such traders. The Tribe's inherent authority would likewise be undermined, since the state regulations would be a factor which the Indians would necessarily have to take into account in enacting their own regulations.

The Papago transaction privilege tax effectively illustrates that state involvement in control and regulation of Indian commerce conflicts directly with the intention of the framers of our Constitution to reserve the field of Indian commerce for the Congress of the United States.

For these reasons, the decision appealed from must be reversed.

Respectfully submitted,

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APPENDIX

RESOLUTION 43, ORDINANCE OF THE PAPAGO TRIBAL COUNCIL, APPROVED ON JULY 22, 1963.

WHEREAS, the State of Arizona has no jurisdiction to impose a sales tax (transaction privilege tax) on sales between Traders located on the Papago Indian Reservation and Indians, and

WHEREAS, by Act of Congress of March 3, 1901 as amended by the Act of March 3, 1903 (25 U.S.C. 261-262) the Commissioner of Indian Affairs has the sole power and authority to appoint Traders to the Indian Tribes and make rules and regulations for, among other things, the prices at which goods may be sold to Indians and thereby pre-empting the field of retail sales to Indians upon the Papago Indian Reservation as against the Arizona transaction privilege tax, and

WHEREAS, Article V of the Constitution of the Papago Tribe provides for the passage of necessary ordinances that are essential to the welfare of the Tribe, and

WHEREAS, it is necessary to meet the financial needs of the Papago Tribe,

NOW, THEREFORE, be it enacted by the Papago Council that the following sales tax (transaction privilege tax) be adopted:

Section 1. A sales tax is hereby enacted upon the gross receipts of all sales made within the confines of the Papago Reservation in the amount of three per cent (3%) of every dollar transacted.

Section 2. It is the intention of this ordinance to make this tax applicable in all instances where the previous sales tax imposed by the State of Arizona applied. The *Arizona*

Revised Statutes § *42-1301* - § *42-1347* shall be used as a reference in determining the applicability of the sales tax in question on the Papago Reservation. The Arizona Revised Statutes are used solely for the purpose of illustration and reference and not adopted as such.

Section 3. Each of the Traders shall withhold from the total tax collected three per cent (3%) for the purpose of remitting said three per cent (3%) to the State of Arizona in compliance with the Arizona Revised Statutes covering transaction privilege taxes.

Section 4. It is the intention of this ordinance to comply with the law of the State of Arizona where applicable. Therefore, the three per cent (3%) that will be sent to the State of Arizona represents that proportion of non-Indian business that is transacted with the Traders on the reservation.

Section 5. It is the intention of this ordinance to be applicable to all business activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, profit or advances, whether directly or indirectly by all Traders, Peddlers, Dealers or Canvassers as the agent of Dealers, Supervisors or Employers.

Section 6. The effective date of this ordinance is July 1, 1963.

Section 7. The administration of this Article is vested in and shall be exercised by the Papago Tribal Council by and through the Administrative Assistant to the Papago Tribe. All payments shall be made to the Papago Tribe.

Section 8. The enforcement of this Article may be had in the Tribal Courts or any other Court of competent jurisdiction.

Section 9. The Tribal Chairman and Administrative Assistant are authorized and directed to formulate rules

and regulations and prescribe forms and procedure necessary to the efficient enforcement of this Article.

Section 10. Any previous provisions, ordinances or resolutions in conflict with this ordinance are hereby rescinded.

The foregoing ordinance was on the 12th day of July, 1963 duly enacted by a vote of 17 for and 0 against by the Papago Council, pursuant to authority vested in it set by the Constitution of the Tribe, ratified by the Tribe on December 12, 1936 and approved by the Secretary of Indians on January 6, 1937, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 894). Said ordinance is effective as of July 1, 1963, after its approval of the Superintendent of the Papago Agency, subject to its rescission by the Secretary of the Interior pursuant to Section 6, Article V of the Constitution and By-Laws of the Papago Tribe.

THE PAPAGO COUNCIL

/s/ Eugene Johnson
EUGENE JOHNSON,
Tribal Chairman

ATTEST:

/s/ Mary Jane Vasquez
MARY JANE VASQUEZ,
Treasurer

APPROVED:

July 22, 1963

/s/ Martin J. Steinwand, Acting Superintendent
THOMAS H. ST. CLAIR, Superintendent

RESOLUTION 44, ORDINANCE OF THE PAPAGO TRIBAL COUNCIL, APPROVED ON NOVEMBER 22, 1963.

WHEREAS, by Act of Congress of March 3, 1901 as amended by the Act of March 3, 1903 (25 U.S.C. 261-262) the Commissioner of Indian Affairs has the sole power and authority to appoint Traders to the Indian Tribes and make rules and regulations for, among other things, the prices at which goods may be sold to Indians and thereby pre-empting the field of retail sales to Indians upon the Papago Indian Reservation as against the Arizona transaction privilege tax, and

WHEREAS, Article V of the Constitution of the Papago Tribe provides for the passage of necessary ordinances that are essential to the welfare of the Tribe, and,

WHEREAS, it is necessary to meet the financial needs of the Papago Tribe,

NOW, THEREFORE, be it enacted by the Papago Council that the following sales tax (transaction privilege tax) be adopted:

Section 1. A sales tax is hereby enacted upon the gross receipts of all sales made within the confines of the Papago Reservation in the amount of three per cent (3%) of every dollar transacted.

Section 2. It is the intention of this ordinance to be applicable to all business activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, profit or advances, whether directly or indirectly by all Traders, Peddlers, Dealers or Canvassers as the agent of Dealers, Supervisors or Employers.

Section 3. The effective date of this ordinance is October, 1963.

Section 4. The administration of this Article is vested in and shall be exercised by the Papago Tribal Council by and through the Administrative Assistant to the Papago Tribe. All payments shall be made to the Papago Tribe.

Section 5. The enforcement of this Article may be had in the Tribal Courts or any other Court of competent jurisdiction.

Section 6. The Tribal Chairman and Administrative Assistant are authorized and directed to formulate rules and regulations and prescribe forms and procedure necessary to the efficient enforcement of this Article.

Section 7. Any previous provisions, ordinances or resolutions in conflict with this ordinance are hereby rescinded.

The foregoing ordinance was on the 11th day of October, 1963, duly enacted by a vote of 15 for and 0 against by the Papago Council, pursuant to authority vested in it set by the Constitution of the Tribe, ratified by the Tribe on December 12, 1936 and approved by the Secretary of Indians on January 6, 1937, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984). Said ordinance is effective as of October, 1963, after its approval of the Superintendent of the Papago Agency, subject to its rescission by the Secretary of the Interior pursuant to Section 6 Article V of the Constitution and By-Laws of the Papago Tribe.

THE PAPAGO COUNCIL
/s/ Eugene Johnson
Tribal Chairman

ATTEST:
/s/ Claudina R. Cherviz
Secretary
APPROVED:
November 22, 1963
/s/ Thomas H. St. Clair
Superintendent